



In the Matter of:

DOUGLAS W. FOLEY,

ARB CASE NO. 99-022

COMPLAINANT,

ALJ CASE NO. 97-ERA-56

v.

DATE: February 2, 1999

BOSTON EDISON COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**ORDER DENYING MOTION TO REOPEN
THE RECORD AND ADMIT NEW EVIDENCE**

By letter of January 27, 1999, Complainant Douglas W. Foley (Foley) requested an extension of time for filing his brief in this matter, indicating that he hoped to present new evidence. We responded by letter of January 28, 1999, explaining that no additional time would be considered unless a motion to reopen the record first was submitted to the Board, and granted. We concluded our letter by noting that in the absence of a motion to reopen, we did not view the request for additional time to be properly before the Board.

Also on January 28, 1999, Respondent Boston Edison Company (Boston Edison) submitted an opposition to Foley's request for an extension of time. In its opposition, Boston Edison notes that Foley's request for additional time did not explicitly identify what the additional evidence to be submitted would be, nor did Foley explain why the material would be relevant to our determination.

Later that same day (January 28, 1999), Foley submitted a motion (in letter form) to reopen the record to admit new evidence. In his motion, Foley states that he seeks

to enter new evidence which was not made available to the Complainant at the time of this ALJ proceeding. This evidence was unavailable to the Complainant at the time, due to a failure of the NRC to process information provided to them in 1995, which was quite relevant to this case. This information is under review by the NRC and appears to have been placed in a priority status.

The Office of Inspector General has also expressed concerns over this evidence to me personally, and therefore raises this evidence to a level of being quite significant to this case. The concerns which both the NRC and the Inspector General's office share are not related to the Respondent[']s reply to this motion, dated January 28, 1999.

Foley letter, Jan. 28, 1999. No documents were submitted for our review.

As we noted in our January 27, 1999 letter to Foley, when considering a motion to reopen the record to admit new evidence the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provide:

Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

29 C.F.R. §18.54(c) (1998); *Doyle v Hydro Nuclear Services*, ARB Case No. 98-022, ALJ Case No. 89-ERA-22, Fin. Dec. & Ord., Sept. 6, 1996, slip op. at 2. When we alerted Foley to this standard, we specifically noted that any motion to the Board asking that the record be reopened should include a full explanation why the new material met this standard.

The motion Foley submitted to the Board on January 28, 1999, seeking to reopen the record is insufficient to meet this test. In his motion, Foley refers to various studies or investigations being conducted by the Nuclear Regulatory Commission or the Office of the Inspector General; however, nowhere does Foley suggest that he *presently* is in possession of specific information that might merit a reopening of the record in light of our ordinary standard (*i.e.*, not previously available to him at trial, relevant to this case, etc). Instead, we are left with the sense that Foley merely is hoping or expecting that these inquiries by government agencies might generate information useful to his case.

Without a concrete showing of the specific evidence that Foley seeks to introduce, accompanied by an explanation of its material relevance and the reason that it was previously unavailable, this Board is unwilling to reopen the record. *See, e.g., Doyle, supra; Timmons v.*

Mattingly Testing Services, Case No. 95-ERA-40, ARB Dec. and Ord. of Remand, June 21, 1996, slip op. at 2; *Nolan v. AC Express*, Case No. 92-STA-37, Sec. Dec. and Remand Ord., Jan. 17, 1995, slip op. at 2. The motion is **DENIED**.

FOR THE ADMINISTRATIVE REVIEW BOARD:

PAUL GREENBERG

Chair

NOTE: Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle.

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